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5 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
6 **OF THE STATE OF CALIFORNIA**
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9 In the Matter of the Protest of:

10 **Laurus Systems**

Proposed Decision

11 Invitation for Bid No. 53118

12 A hearing on this protest was held on September 17, 2004, in Sacramento, California, by
13 Donna D. Ferebee, Hearing Officer, who was assigned to hear this matter by the Executive Officer of
14 the Victim Compensation and Government Claims Board (Board).

15 The protestant, Laurus Systems, Inc. (Laurus), was represented by Chris Rogers, Attorney
16 at Law.

17 The Department of General Services (DGS), Procurement Division (Procurement), was
18 represented by Kathleen Yates, Senior Staff Counsel.

19 The proposed awardee, Berkeley Nucleonics Corporation (Berkeley), was represented by
20 Carin LeVine, Vice President and Counsel to Berkeley.

21 **Jurisdiction**

22 The protest complies with the procedural requirements of Public Contract Code
23 section 10306 and California Code of Regulations, title 2, sections 872.1 and 872.7.¹

24 **Basis for Protest**

25 In its detailed statement of protest, Laurus made the following arguments in support of its
26 protest:

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28 ¹ All citations to regulations are to California Code of Regulations, title 2, unless otherwise specified.
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1. Berkeley's bid is non-responsive because it failed to meet the Invitation for Bid (IFB) General Requirements, Section 1.2.4, which, it argued, required bidders to have previously sold the same detectors being offered under the bid to federal or public safety agencies, and also required bidders to provide references of three such federal or public safety agency customers.

2. Berkeley is not a responsible bidder because it lacks the qualifications required by the IFB General Requirements, Section 1.2.4, in that it has not previously sold or delivered the detectors that are the subject of the bid to other federal or public safety agencies, and it falsely represented that it had.

Findings of Fact

1. IFB number 53118 is for the acquisition of 266 hand-held gamma ray radiation detectors, with warranty, for the California Highway Patrol.

2. Eleven bids were submitted. Procurement determined that the three lowest bidders were not responsive to the technical specifications of the IFB.

3. Procurement determined that the bids submitted by both Laurus and Berkeley were responsive to the technical specifications of the IFB.

4. Laurus' bid was \$332,500.00 and Berkeley's bid was \$338,019.50. After the application of the five percent small business preference to Berkeley's bid, its evaluated net bid was \$321,394.50. Laurus is not eligible to receive the small business preference. Procurement determined that after the application of the preference, Berkeley was the lowest responsible bidder meeting specifications.

5. A notice of intent to award was posted on June 28, 2004, from which Laurus filed its notice of protest the same day.

6. In written rebuttals to responses submitted by Procurement and Berkeley, Laurus argued for the first time that (1) Berkeley did not include in its bid a letter from the manufacturer certifying that it is an authorized supplier; and (2) Berkeley was not eligible for the small business preference. The hearing officer did not permit the presentation of evidence as to these two issues because they were not raised in either the detailed statement of protest or the responses to the detailed statement of protest as required by Regulation section 873.7(c).

1 7. At the hearing, Procurement was entitled to present its case first because the
2 proposed award was to a bidder other than the lowest bidder. (Reg. § 873.9(b).) Procurement
3 declined to call any witnesses, and instead relied solely on the declarations of Nicole Delgado and
4 Nuland Wong submitted with its response to the detailed statement of protest.

5 8. The declaration of Nuland Wong, Procurement Engineer, stated that he was tasked
6 with developing the technical bid specifications for the radiation detectors. Mr. Wong declared that he
7 sent draft bid specifications to Laurus for review and comment, and Laurus provided suggestions, not
8 all of which were incorporated into the specification. Mr. Wong declared that Laurus proposed the
9 following language:

10 “Detectors shall be new and the latest model in current production by
11 manufacturer and shall have been previously sold and delivered by
12 vendor to other Federal or Public Safety Agencies, a minimum of three (3)
13 references shall be provided. Used, shopworn, demonstrator, prototype,
14 or discontinued models are not accepted. The detector offered shall be a
standard catalog item for which printed literature and specifications are
available.” (Emphasis added.)

15 Mr. Wong stated in his declaration that he rejected the “by vendor” proviso in order to
16 avoid exclusion of sales by manufacturers or distributors. He stated that he did not incorporate
17 revisions into the final bid specification that would inhibit open, competitive bidding. He also stated
18 that he changed the suggestion on the bidder references requirement so that the requirement was in
19 a stand-alone sentence. The final specification was numbered 1.2.4, and read as follows:

20 “Detectors shall be new and the latest model in current production by
21 manufacturer and shall have been previously sold and delivered to other
22 Federal or Public Safety Agencies. A minimum of three (3) references
23 shall be provided. Used, shopworn, demonstrator, prototype, or
24 discontinued models are not accepted. The detector offered shall be a
standard catalog item for which the printed literature and specifications
are available.”

25 9. The declaration of Nicole Delgado, Associate Materials Analyst, Procurement Division,
26 stated that she was the buyer who conducted the acquisition for this IFB. Ms. Delgado declared that
27 she requested and received additional contact information for four references for Berkeley and that
28 she called them to confirm they had a current business relationship with Berkeley. Ms. Delgado
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1 stated that she did not ask whether they were using the nukeALERT 951, which was bid by Berkeley,
2 because the specifications did not require the bidder to have sold the product bid. She stated that
3 bidders only had to provide information verifying business relationships with customers. She stated
4 that she spoke with Jeff Fuller of D-Tect Systems, the manufacturer of both the mini-rad and the
5 nukeALERT 951, and he told her that the mini-rad and the nukeALERT are exactly the same unit, the
6 only difference being that Laurus markets the product as the mini-rad and Berkeley markets it as the
7 nukeALERT. Ms. Delgado stated that Mr. Fuller told her that as the manufacturer, it has sold some of
8 the units to federal agencies, which meets the IFB requirements.

9 10. Laurus called Nicole Delgado as a witness. Ms. Delgado was asked about her
10 telephone call to Jeff Fuller of D-Tect Systems. She testified that she questioned Mr. Fuller about
11 Berkeley's references. She was asked why she questioned Mr. Fuller as to who sold the mini-rad
12 and who sold the nukeALERT 951, and she responded that she does not remember, and then when
13 asked again, testified that she wanted to verify who sold which product. She testified that the
14 purpose of her call was to verify that the mini-rad and the nukeALERT 951 are the same product. In
15 response to a question by the hearing officer, Ms. Delgado clarified that she discussed with Mr. Fuller
16 the first section of Section 3.c. of Berkeley's bid.² Ms. Delgado also testified that she called
17 Berkeley's references. She testified that she asked those references questions about their
18 experiences dealing with Berkeley, such as the quality of Berkeley's customer service. She testified
19 that she did not ask those references whether they use the product. Ms. Delgado testified that the
20 three references called for in the bid specification section 1.2.4, were for the bidder (rather than for
21 the product) and that there were no other reference requirements in the IFB. She further testified
22 under questioning by Berkeley, that after contacting Berkeley's references, she was comfortable that
23 Berkeley is a reputable company.

24 11. Berkeley called Nuland Wong as a witness. He testified that his concern when drafting
25 the IFB was with the technical specifications, not who was using the product. He testified consistent

26 ² The title of Section 3.c. is "Berkeley Nucleonics Reference List." The heading of the first section of the list is
27 entitled, "Customers of miniRAD/NukeALERT 951 (Customers who 'switched' from sole source to new product)."
28 The following section (numbered "1") is entitled, "Other miniRAD/NukeALERT 951." The section following section
29 1 (numbered "2") is entitled, "Berkeley Nucleonics Customers of Radiation Detectors and Training."

1 with his declaration that the reference requirement was put in a separate sentence to indicate that it
2 requested information about the bidder's references, rather than references for the product.

3 **Determination of Issues**

4 1. Laurus has the burden of proving by a preponderance of the evidence that it was the
5 lowest responsible bidder meeting specifications. (Reg. §§ 873.7(a), 873.8.)

6 2. Evidence introduced at the hearing shall be limited to issues identified in the
7 protestant's detailed statement of protest, and in the responses to the detailed statement of protest.
8 (Reg. § 873.7(c).) The issues as to whether Berkeley submitted a certification from the manufacturer
9 and its eligibility for the small business preference were not properly raised as found in Finding of
10 Fact, Paragraph 6. Therefore, those issues are not before the Board. (*See Digital Biometrics, Inc. v.*
11 *Anthony* (1993) 13 Cal.App.4th 1145, 1156.)

12 3. A fundamental precept of competitive bidding is that a bid must conform to the
13 specifications; a bid that does not conform must not be accepted. (*Konica Business Machines v.*
14 *Regents of the University of California* (1988) 206 Cal.App.3d 451, 454, 253 Cal.Rptr. 591, 593 citing
15 47 Ops.Cal.Atty.Gen. 129, 130 (1966).)

16 4. The central question involved in this protest is whether the IFB required bidders
17 themselves to have previously sold the radiation detector product to federal or public safety agencies
18 as Laurus contends. Had Procurement accepted Laurus' suggestions for wording Section 1.2.4 in
19 whole, the answer would be yes. Such a requirement is clearly what Laurus had in mind when it
20 proposed that the specification say, "Detectors...shall have been previously sold and delivered by
21 vendor..." (Emphasis added.) But the "by vendor" language was rejected by Procurement and omitted
22 from the final specification in the IFB. The rejection of Laurus' proposed addition of "by vendor" is
23 strong evidence that Procurement intended the IFB only require that federal or public safety agencies
24 had been sold and delivered the product—by anyone. There is insufficient evidence that the IFB
25 required bidders to have previously sold the detectors to federal or public safety agencies. Since there
26 was no such requirement in the IFB, Laurus' contention that Berkeley's bid was non-responsive to the
27 specifications must fail.

1 5. Laurus argued that the reference requirement in Section 1.2.4, was to show the bidder
2 previously supplied the very product to the federal and public safety agencies. Procurement argued
3 that it placed the requirement in a “stand-alone” sentence to convey that general customer (versus
4 product) references were being sought. As already discussed, there is insufficient evidence to support
5 Laurus’ position. But even assuming for the sake of argument that the IFB actually required “product”
6 references, Berkeley could not be found non-responsive since its reference list also included names of
7 agencies who have used the product.³

8 6. As to the issue of responsibility, Laurus argued that Berkeley’s reference list is
9 fraudulent and Laurus is not a responsible bidder because it intended to falsely represent that the
10 companies and agencies listed were customers to which it had previously sold the detectors. The
11 responsibility argument is grounded in Laurus’ theory that bidders must have previously sold the
12 detectors. Having found no such requirement in the IFB, and there being no credible evidence that
13 Berkeley intended to deceive Procurement, the responsibility argument must also fail. Moreover,
14 there is sufficient evidence that at least some of the references listed were clearly provided to show
15 that Berkeley is a reputable company in good-standing. And no credible evidence was presented to
16 show that Berkeley is anything other than a reputable company in good-standing.

17 7. While it may appear that Procurement in some instances acted inconsistently with its
18 position that bidders need not have previously sold the product themselves, Procurement did nothing
19 to mislead bidders in that regard. In fact, Laurus, having submitted the suggested “by vendor”
20 language to Procurement, was in a unique position to know that the absence of that language in the
21 final IFB meant that Procurement had rejected its suggestion. Based on the totality of the facts in the
22 record, Laurus has failed to meet its burden of proving by a preponderance of the evidence that
23 Berkeley was either non-responsive or not responsible. Laurus has failed to establish that it was the
24 lowest responsible bidder meeting specifications.

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28 ³ It is immaterial that Berkeley listed agencies who had used the nukeALERT 951, since it is undisputed that the
29 nukeALERT 951 and the mini-rad are exactly the same product.

Order

The protest to the award of a contract under IFB number 53118 is denied.

Date: October 19, 2004

DONNA D. FEREBEE
Hearing Officer
Victim Compensation
and Government Claims Board

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5 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
6 **OF THE STATE OF CALIFORNIA**
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9 In the Matter of the Protest of:

Notice of Decision

10 **Laurus Systems, Inc.**

11 Invitation for Bid No. 53118
12

13 On October 29, 2004, the California Victim Compensation and Government Claims Board
14 adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced
15 matter. The Decision became effective on October 29, 2004.

16 Date: October ____, 2004

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18 JUDITH A. KOPEC
19 Chief Counsel
20 California Victim Compensation and
21 Government Claims Board
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